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# In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 110

JOHN P. DONNELLEY

*v.*

THE UNITED STATES OF AMERICA

*On Certificate From the United States Circuit Court of Appeals for the Ninth Circuit*

## PETITION FOR REHEARING BY PLAINTIFF IN ERROR

Comes now Plaintiff in Error and, by leave of Court, petitions this Honorable Court to grant a rehearing of the above entitled cause, as determined by decision of date April 9, 1928, and respectfully submits as reason therefor, the following:

### STATEMENT OF REASONS OR GROUNDS

1. That portion of the opinion of the Court reading: "But defendant failed to submit any other brief or to file any statement of points or specifications of errors intended to be urged here" —is erroneous. Briefs were filed on behalf of

the Plaintiff in Error upon all the questions of law raised upon the entire record. Such briefs contained a statement of points or specifications of error intended to be and which, were both therein and in oral argument urged upon this Court.

2. That there has been presented to this Court important questions of law which have not been determined, the determination of which are essential to the question whether John P. Donnelley is guilty of the alleged offense for which he was convicted.

3. That in the Transcript of Record filed in this Court beginning on page 11 thereof and ending on page 19, are fifteen specific assignments of error, which in the brief of Plaintiff in Error filed upon the entire record, at pages 8 and 9 thereof are grouped into three main classifications,—quoted from said brief—as follows:

"QUESTIONS OF LAW PRESENTED ON RECORD

The question of law presented upon the record of this case may be classified in three groups in the order in which they will be presented in the argument.

(a) That the count of the Information upon which defendant was adjudged guilty fails to state an offense. (Assignment of error No. 3, Transcript pp. 11, 46, 47.)

(b) That the jury was misinstructed in matters of law. (Assignments of Errors Nos. 7, 8, 9, 10, 11, 12, 13, 14 and 15, Transcript pp. 12 to 19, 45, 46.)

(c) That the evidence was and is insufficient to support the verdict and judgment thereon. (Assignments of Errors Nos. 1, 2, 4, 5, and 6, Transcript pp. 11, 12, 45, 46.)"

4. That the Court materially erred to the injury of Plaintiff in Error in its conclusions respecting the one question determined—whether a violation of Section2 of the National Prohibition Act is an offense within the true intent and meaning of Section 29 of said Act—the errors being in the following particulars:

(a) The Court held that said Section 29, "declares that violators of any provision shall be punished" when said section in fact reads: "Any person who violates any of the provisions * * * * * **for which offense** a special penalty is not prescribed, shall be fined" etc. (Italics ours.) The effect of such holding being to eliminate as unnecessary or meaningless the words of the statue "for which offense"—contrary to fundamental rules of statutory construction to the effect that the entire language shall be considered and given effect.

(b) The Court, by use of the expression—"intentionally failed to report,"—in effect, read into the statute as definitive of the offense, for which Defendant in Error was convicted—intentional failure, when no such language appears in the statute. Where the intent with which an act is done is made the gist of an offense the legislative power must clearly so prescribe.

(c) The Court in its opinion failed to apply or advert to the rule contended for by Plaintiff in

Error, and conceded by the briefs for the Government to be correct and applicable, concerning the determination of asserted new statutory offenses, such rule being as stated in the Government's brief on the entire record, as follows: "In order that an act or ommission may be held to constitute an offense it must be so declared by Act of Congress 'in language that need not deceive the common mind,' for 'every man should be able to know with certainty when he is committing a crime.' (United States vs. Reese, 92 U. S., 214, 220."

Brief for the United States (November, 1927) p. 11.

(d) The Court in its opinion failed to apply the well established rule in determining whether a statute should be construed to be penal in character that where there is a well founded doubt as to an act being penal in character it must be resolved in favor of the liberty of the citizen.

(e) The Court in its opinion erroneously holds that "the evidence showed and the verdict, when read in the light of the Court's charge, means that the jury found that Curren was discovered transporting ten barrels of intoxicating liquor and that Plaintiff in Error, with actual knowledge of that violation intentionally failed to report the crime and offender for prosecution." This holding is erroneous for the reason that the jury was never given an opportunity to determine the guilt of Plaintiff in Error by any test as to whether Curren was an offender or that he had knowledge thereof.

Plaintiff in Error was refused the following specific instruction:

"The jury is instructed that the Federal Prohibition Director is not required to report to the United States Attorney the mere fact that an offense has been committed against the National Prohibition Act, when he is not in possession of evidence showing or tending to show the person or persons guilty of such offense."
Transcript of Record pp. 12, 12, 33.

The Court's instructions to the jury eliminated the question of whether Curran was an offender or whether any offender was known. The effect of the instructions was to say to the jury that knowledge of a mere offense without knowledge of an offender required a report and failure to report constituted an offense.

Instructions given on this point were as follows:

"It is incumbent upon the jury to ascertain whether the law has been violated. A law may be violated and we know not who violates it. * * * * In this case if Curran was transporting whiskey (beer) and he didn..'t know it was whiskey, the jury might say he didn't intend to violate the law, therefore he cannot be convicted, nevertheless there was a violation of the law in that he had possession and was transporting liquor along a public highway. * * * * The statute is the law as it is written and when it says that an officer must report violations of the law, it means just what it says, and it cannot be construed to mean that he need not report violations unless he has knowledge both of the violation and the person guilty of such violation. * * * * The one thing for you to determine is whether the defendant has violated it."
Transcript of Record pp. 16, 17, 18, 38, 39, 44, 45.

The exception taken by Plaintiff in Error in respect to these requested instruction refused and those given upon the particular question dealt with in the opinion of this Court is as follows:

"The defendant excepted to the refusal of the Court to give defendant's requested instructions, one to four and seven to eight, both inclusive, upon the ground that they contained a correct statement of the law, and based on the theory that the defendant could not be found guilty of a failure to report, unless Curran was guilty also; that the defendant excepted to the instructions given by the Court, and each and every part thereof, the effect of which was to instruct the jury that it was the duty of the defendant to report to the District Attorney violaions of the National Prohibition Act, regardless of knowledge of who the offender or offenders were; that the instructions given by the Court were to the effect that they could find the defendant guilty, irrespective of guilt upon the part of Curran."

Transcript of Record pp. 45, 46.

f) The Court inadvertently misconceived the contentions in this case in holding: "The substance of the contention is that intentional failure of a prohbiition director or other enforcement officer having knowledge of crimes and offenders against the Act, to report them to the United States is not a punishable offense." The contention of the Plaintiff in Error was that the failure of the Commissioner of Internal Revenue, his agents or assistants to report to the United States Attorney as required by the provisions of Section 2 of the National Prohibition Act was not an offense within

the true intent and meaning of Section 29 of the Act, and further that Section 2 did not require report of mere knowledge of an offense but only in case where the offender also was known.

ARGUMENT

1. A statement of points and specifications of error urged upon the Court with brief supporting the same was filed with the Clerk of this Court.

By consent of the Clerk of the Court and with the approval of the Solicitor General, the briefs upon the part of Plaintiff in Error as filed in the Circuit Court of Appeals, were permitted to be filed in this Court.

In respect to this matter the following excerpts from correspondence between the Clerk of this Court and counsel for Plaintiff in Error is submitted:

"Reno, Nevada, Oct. 28, 1927.

Hon. Charles Elmore Cropley,
Clerk of the Supreme Court of the United States,
Washington, D. C.

Dear Sir:

**Re: Donnelley v. U. S. No. 110**

We note that the Supreme Court has ordered that the entire record in this case be certified up to the Court so that the whole matter in controversy may be considered by the Court, and that the cause is set for hearing on the 21st day of November next.

We are not familiar with the practice in cases where this procedure is taken, but assume that

it will not require any additional printing of the record in your office. We assume, also, that it will not require the printing of additional briefs, but that the briefs filed in the Circuit Court of Appeals for the 9th Circuit may be used upon the hearing before the Supreme Court. If we are incorrect in this view, we would appreciate your advising us in respect to the same.

NORCROSS & CHENEY
By FRANK H. NORCROSS".

"OFFICE OF THE CLERK,
SUPREME COURT OF THE UNITED STATES,
WASHINGTON, D. C.

November 3, 1927

Norcross & Cheney, Esqs.,
Reno, Nevada.

Gentlemen:

* * * * * * * * * * *

If you feel that the briefs already on file cover everything they should, it will not be necessary to file new briefs for the next hearing of the case.

Yours truly,
CHARLES ELMORE CROPLEY, Clerk,
By Reynolds Robertson,
Ass't."

RR:CZ

Reno, Nevada, November 9, 1927.

Hon. Charles Elmore Cropley,
Clerk, Supreme Court of the United States,
Washington, D. C.

In re Donnelley v. United States
No. 110, Supreme Court,
1927 Term.

Dear Sir:

Yours of the 3rd inst. relative to the case of

Donnelley vs. United States, No. 110, October Term, 1927, received.

We also received from the Clerk of the Circuit Court of Appeals ten copies each of the opening and closing briefs filed on behalf of Capt. Donnelley in that court. We have added to these copies four extra copies which were available in our office, and are mailing the same to you. We hope this number of copies will be sufficient for your purpose so that the printing of additional copies of our briefs filed in the Circuit Court of Appeals will be unnecessary. Immediately upon receiving notice of the setting of the case for hearing on November 21st next, we mailed copies of our briefs filed in the Circuit Court of Appeals to the Solicitor General and to Assistant Attorney General Willebrandt.

As stated in our prior correspondence, we are anxious to reduce the expense to Capt. Donnelley to a minimum. Capt. Donnelley would not care to file an affidavit in **forma pauperis**, nor do we think that he is in such financial condition that he would be justified in doing so. However, he is in straightened circumstances due to financial reverses, protracted illness and ill health preceding and following the trial of this cause. Any absolutely necessary expense we will take care of.

We are enclosing an index for the briefs if it is necessary for the same to be printed and added with new covers to the briefs mailed.

Very truly yours,

NORCROSS & CHENEY,

By FRANK H. NORCROSS."

(9)

No. 110

# In the Supreme Court of the United States

October Term, 1937

JOHN P. DONNELLY

v.

THE UNITED STATES OF AMERICA

On Certificate from the United States Circuit Court of Appeals for the Ninth Circuit

BRIEF FOR DEFENDANT IN ERROR

"Reno, Nevada, November 15, 1927.
Hon. Charles Elmore Cropley,
Clerk, Supreme Court of the United States,
Washington, D. C.

In re: Donnelley v. United States
No. 110, Supreme Court,
1927 Term.

Dear Sir:

Supplementing our letter to you of the 9th inst., we have to advise you that the writer will be unable to be present in Washington on the 21st inst., the date set for the submission of the case of Donnelley vs. United States.

The writer will, therefore, avail himself of the privilege of requesting you to submit the cause on behalf of the Plaintiff in Error on the briefs filed on behalf of the Plaintiff in Error in the Supreme Court of the United States and in the Circuit Court of Appeals for the 9th Circuit.

Very truly yours,
NORCROSS & CHENEY
By Frank H. Norcross."

"OFFICE OF THE CLERK,
SUPREME COURT OF THE UNITED STATES,
WASHINGTON, D. C.

November 15, 1927

Norcross & Cheney, Esqs.,
Reno, Nev.

Gentlemen:

I have your letter of the 9th instant with reference to the case of Donnelley vs. United States, No. 110, October Term, 1927.

I note that you are sending me 14 copies of the

opening and closing briefs in the Circuit Court of Appeals, and further that you served copies of these papers upon the Solicitor General and Assistant Attorney General Willebrandt.

While the rule of the Court requires that 40 copies of briefs be on file, under the circumstanes I will accept these briefs. I will accordingly have them recovered if necessary when they reach me, and file them as the briefs for Captain Donnelley in the case.

Yours truly,

CHARLES ELMORE CROPLEY, Clerk,
Per Reynolds Robertson,
Assistant."

RR-F

"OFFICE OF THE CLERK,
SUPREME COURT OF THE UNITED STATES,
WASHINGTON, D. C.

November 18, 1927.

Norcross & Cheney, Esqs.,
Reno, Nev.

Gentlemen:

I thank you for your letter of the 15th instant, with reference to the case of Donnelley vs. United States, No. 110, October Term, 1927.

As requested therein, I will submit on briefs for Captain Donnelley when the case is called.

Yours truly,

CHARLES ELMORE CROPLEY, Clerk,
Per Reynolds Robertson,
Assistant."

"POSTAL TELEGRAPH—TELEGRAM

Reno, Nevada, Nov. 20, 1927.

Hon. Charles Elmore Cropley,
Clerk of Supreme Court of United States,
Washington, D. C.

You are requested to submit case of Donnelley versus United States Number One Hundred Ten on behalf of plaintiff in error to Supreme Court on briefs filed in Supreme Court and Ninth Circuit Court of Appeals. Stop Letter same effect dated fifteenth sent air mail. Stop Transcript and yours fifteenth reecived.

Frank H. Norcross."

A letter of date November 2, 1927, written by Hon. William D. Mitchell, Solicitor General, to counsel for plaintiff in error and covering the very matter of use in this Court of briefs filed in the Circuit Court of Appeals, contains the following excerpt:

> "I suggest that you write to the Clerk of the Supreme Court and tell him your situation and follow his suggestions in the matter."

Counsel for Plaintiff in Error are advised by the Clerk of this Court that he distribute copies of the said briefs to each of the members of this Court.

It may be conceded that in some purely technical respects the strict letter of the Rules of this Court were not complied with. It is true that there were only fourteen instead of forty copies filed, and a formal filing of acknowledgment of receipt of service of copies by the Solicitor General may not have occurred. However, the number filed was

sufficient for all practical purposes, and such number was accepted for the purpose of the case by the Clerk. The briefs filed on behalf of the United States discussed all the questions raised in the briefs of Plaintiff in Error and no questions were raised by counsel for the Government that the points urged in the briefs, included in the assignments of error and embraced in the Bill of Exceptions were not properly before the Court.

The cases cited in the opinion of the court, we respectfully submit, we think are not in point in the situation presented in this case. In Southwestern Express Co. v. Robertson, 264 U. S., 541, it was held, quoting from the sylabus: "The Supreme Court of the United States will not consider assignments of error appearing in the record, but not mentionde in the argument." In Home Benefit Association v. Sargent, 142 U. S. 691, 694-695, the Court in its opinion said: "Although there are twenty-five alleged errors set forth in the assignment of errors filed in the Court below, yet, as the brief of the plaintiff in error relied on but a few of them, we confine our attention to those thus relied on."

Unless the briefs filed by plaintiff in error in Circuit Court of Appeals and used for filing and filed in this Court are wholly disregarded, the rule applied in the decisions cited have no application to this case. All errors assigned in the record were argued in the said briefs. In respect to errors assigned and argued in respect to instructions, the Government's brief conceded material error in respect to instructions requiring reports where the offender was unknown. The decision rendered in

this case, as we understand it, holds that reports are only required where an officer "having knowledge of crimes and offenders" fails to report. The conviction of the defendant in the case we think entirely due to the several instructions to the effect that knowledge of an offence only required a report.

The Court in Green v. Elbert, 137 U. S., 615, 621, speaking through Chief Justice Fuller, said:

> "To the proper conduct of the business of this Court rules are necessary, and having been prescribed, reasonable compliance with them is expected and must be insisted upon. When they are disregarded, dispensation from the consequences can only be extended where the circumstances furnish adequate excuse."

In this case it is respectfully urged that there was a reasonable compliance with the rules and to the extent they may have been disregarded the circumstances affords impelling reasons for the Court to grant its dispensation, especially so as no objection was interposed by counsel for the Government and no one could have been misled or injured by the technical non-compliance approved by the Clerk of this Court.

2, 3,

The Bill of Exceptions, the assignments of error and the briefs (assigning the same should be considered) filed, presented important questions of law, affecting the question of guilt or innocence of defendant, in addition to the one point decided. Without attempting here a reference to all the assignments of error it should be sufficient, we think, to call to the attention of the Court the

matter of assignments of error considered in the briefs upon both sides respecting instructions given by the Court to the effect that defendant could be found guilty if knowledge of an offense upon his part was shown without knowledge of the offender and the refusal to give requested instructions that the contrary was the law. The instructions requested and refused and those given upon this question are set out in full in reason 4 e supra.

The Court in its opinion, as we construe it, holds that guilt of a crime upon the part of a Prohibition officer does not attach unless such officer—to quote from the opinion—"having knowledge of crimes and offenders against the Act "fails to report them." So holding, the Court, if it will consider the assignments of error argued, must also we submit hold that prejudicial error occurred in respect to these particular instructions.

While the brief for the United States does not concede error in respect to all the instructions requested and refused and those given concerning this question it does concede error in the case of one of the number refused and one given. From the Government's brief we quote:

> "Request No. 3, (R. 13) asked the Court to instruct the jury 'that the knowledge upon his part making it obligatory for him to so report consists of sufficient evidence in his possession to reasonably justify prosecution,' and that this related both to the fact that an offense had been committed and to the identity of offender. This request was proper and we know of no good

reason why it or the substance of it was not given."

Brief for the United States pp. 19, 20.

"As these allegations were undoubtedly essential to apprise the defendant of the accusation against him, the instruction that the jury might convict, although finding that Carran had not committed the violation alleged, appears to have been erroneous."

Brief for the United States p. p. 22, 23.

True a "Memorandum for the United States on Reargument" was subsequently filed in which the Solicitor General does not appear to have joined, and in which there appears a reversal of position by a portion of counsel for the Government in respect to the matter of instructions as well as upon the question originally certified by the Circuit Court of Appeals, but the question as we view it here, is not whether counsel for the Government were correct in the position taken in their "brief" or the contrary position taken in their "memorandum" but that it is one of importance to plaintiff in error and was submitted to the Court for its decision.

4a. The Court in its opinion failed to give weight to the word—"offense"—appearing in Section 29 of the Act. The effect of the opinion is to eliminate that word. The word, however, is there and settled rules of construction require that it be considered and given effect. It was designedly used by Congress. We submit that no other meaning can be given to it, without effecting its elimination, than to say that it means that acts of

commission or omission in other sections of the statute therein declared to be an offense and for which no special penalty is provided shall be punished.

In the brief for the United States after citing decisions of the Court laying down rules governing the construction of penal statutes and citing provisions in numerous Federal statutes appears the following conclusions:

> "All through Title II, interwoven with prohibitions against liquor traffic, are found many directions to administrative officers intended to prescribe the procedure to be followed. We think that Section 2 was similarly intended to prescribe an administrative course to be followed, and that the provision in Section 29 for punishment of any person who violates any of the provisions of the title was not intended to brand as criminal the failure of administrative officers or United States attorneys to perform any one of the inumerable duties imposed upon them by Title II."
>
> Brief for the United States, Page 17.

While in two briefs filed in behalf of the United States the opinion is definitely expressed that the question propounded by the Circuit Court of Appeals should be answered in the negative, the "Memorandum" brief filed upon re-argument presents a contrary argument in which appears what seems to us to be some very remarkable statements unless the liberty of a citizen in certain cases is to be now subject to some new

rule of construction of penal statutory provisions. The "Memorandum" brief concludes with the statement (page 21) that "Despite the fact that the better view may be that the statute does not describe an offense, it must be conceded that the effect of so interpreting the statute * * * * would be to favor the lawbreaker" etc. At the opening of the "Memorandum" brief is to be found this statement: "Recognizing the administrative desirability of sustaining the lower Court's interpretation, and because the question is one of first impression and a close one, the following additional observations in support of the construction placed upon the Act by the District Court are hereby submitted."

It is stated in the brief for the United States (p. 11) "in order that an act of omission may be held to constitute an offense it must be so declared by Act of Congress 'in language that need not deceive the common mind,' for 'Every man should be able to know with certainty when he is committing a crime' (United States v. Reese, 92 U. S., 214, 220.)" How can it be argued that even "a close question" should be resolved against the liberty of the citizen to say nothing of "the fact that the better view" is in favor of such liberty. We most respectfully submit that even "administrative desirability" is not sufficient reason for suspending the rule that a well founded doubt as to an act being a public offense is to be resolved in favor of the liberty of the citizen which has been generally applied by the Courts since the opinion of Chief Justice Marshal in United States vs. Wiltberger, 5. Wheat. 76. If Congress failed to express itself with that certainty which the

rights of liberty presupposes, the remedy is still with Congress. Otherwise, as said by this Court in Reese case cited supra: "This would, to some extent, substitute the judicial for the legislative department of Government."

4. b. The word "intentional" does not appear in Section 2 or in Section 29 of the Act. If Section 2 defines an offense it is that of failing to report a known offense and offender. How can it be said that the gist of that offense shall be the intent or motive back of the failure unless resort is had to construction approaching at least closely to what is called judicial legislation. It is difficult to conceive that a legislative body will undertake to define a particular offense and omit to mention its most important element. Apparently when Congress in the Act wished to make intent an element in an act it provided to be enjoined it clearly said so as in Section 23. If intentional failure is the crime declared in the statute, then that should be the charge made in the information. There is no charge of intentional failure unless resort is had to further construction that other language used was its equivalent.

This case was not tried upon any theory that any particular intent or motive was an element of the case. There were no intentions to that effect.

4. c. d. These reasons or grounds have been covered in foregoing argument.

4 e. The Court in its opinion saying—"The evidence showed and the verdict, when read in the light of the Court's charge, means that the jury found that Curran was discovered transporting ten barrels of intoxicating liquor and that plain-

tiff in error, with actual knowledge of that violation, intentionally failed to report the crime and offender for prosecution."

We most respectfully but earnestly submit that it cannot be said that "the verdict when read in the light of the Court's charge means that the jury found that Curran was discovered" knowingly "transporting ten barrels of intoxicating liquor and the plaintiff in error with actual knowledge of that violation, intentionally failed to report the crime and offender for punishment." The Court specifically instructed the jury that " the statute * * * * * cannot be construed to mean that he need not report violations unless he has knowledge both of the violations and the person guilty of such violation."

The jury was not called upon to determine the question of the guilt of Curran as an essential element of the guilt of defendant. Besides, whatever the guilt of Curran, the question in respect thereto was the knowledge possessed by Donnelley on or about September 2, 1922 (R. 2). It is, we submit, not just or fair to Donnelley for this Court to indulge in any assumptions of knowledge upon his part of Curran's guilt in the light of the instructions and the evidence. The instructions told the jury in effect that Curran's guilt was immaterial. Curran may have been guiltless of intentional wrong, but, nevertheless, someone was causing the liquor to be transported on the highway and some one was guilty of that offense. There was an offense and Donnelley was aware of that. That much was a certainty. That much the

jury was advised was all that was necessary to require a verdict of guilty.

If the jury had been instructed that in order to convict Donnelley they must be satisfied of the guilt of Curran and that Donnelley had knowledge of that guilt, no conviction in our judgment would ever have been obtained. However, that may be, such guilt upon the part of Curran and the knowledge thereof upon the part of Donnelley was an essential element in the case to be established by the Government under proper instructions to the jury.

The question of the sufficiency of the evidence is considered at length in the brief of Plaintiff in Error pages 28 et. seq. Certain points in respect thereto showing that knowledge upon the part of defendant of Curran's guilt could by no possibility be deemed an established fact may here be briefly adverted to. The Record (p. 20) shows that Curran was "then and now a drayman engaged in the business of drayage for hire in the City of Reno." There was nothing manifest at the time of the seizure that Curran knew that the unmarked barrels he was transporting contained liquor. He made an explanation of the circumstances of his having the load which at the time, at least, did not appear to be untrue. It then was apparent that no matter what the knowledge of Curran was, Curran was not the principal offender. Donnelley told officer Dubois that "he would let Curran go and let him take his truck, that we could get him at any time." x (R. 22), "All field officers under defendant had general instructions to investigate and report to him violations." (R. 23.) It

was the duty of the field officers to continue the investigation and there is nothing in the evidence to indicate they did not do so, certainly no obstacles were put in their way by defendant Donnelley who took the position "if we got evidence that Curran did know, we would complete our case and make a report." (R. 24). Donnelley was an executive officer under the provisions of Section 38 of the Act and not an investigating officer or an agent "in the field service." The rules adopted restricted his duties to office service, see first brief for Plaintiff in Error, p. p. 5, 6. Even with all the circumstances relied upon by the Government at the trial, there is nothing in the record from which a court might say that the jury under proper instructions would have imputed knowledge of Curran's guilt to Donnelley and that the latter intentionally failed to report. Indeed, we believe if the question had been submitted a verdict of not guilty would have promptly been returned.

We trust that we may be pardoned in saying that the Plaintiff in Error would not be in this Court or in any other Court of Appeals if there was involved merely the question of a fine. To the Plaintiff in Error there is the bigger question of the closing of a long career as a trusted peace officer with conviction of violation of duty. For that reason he asks for a trial upon issues of fact and law as they really are and not on such law as is given in the instructions of the Court. An impelling reason why we think defendant should be entitled to such trial is the fact that the information was filed by and the prosecution directed by

a United States Attorney whose "relations with the defendant were unfriendly." (R. 29).

We are advised that upon the argument of this case counsel for the Government made the statement that by reason of Donnelley's failure to report the statute of limitations was enabled to run against the prosecution of Curran. If such statement was made it was through inadvertence, for the record shows that the United States Attorney had knowledge of the matter at least as early as March, 1923, six months after the beer seizure. The testimony of the United States Attorney being "that he never heard of the beer seizure from the Curran truck until March, 1923, when it was being destroyed by order of the Court." (R. 24). An order for the destruction of the beer, necessarily obtained through the office of the United States Attorney was "made on March 5, 1923, the order containing the following descriptive language: 'No case—ten barrels of beer'." If the Government ever had any case against Curran and desired to prosecute him, the office of the United States Attorney had knowledge or at least the means of obtaining knowledge at least as early as March 5, 1923. We think it is inconceivable that the office of the United States Attorney could have applied for and obtained an order for the destruction of the beer and have so designated it as "No case—ten barrels of beer" without having received information of the affair from the Director of Prohibition.

4 f. This reason or ground respecting the contention in the case has been sufficiently covered

in other portions of this petition and is we think sufficiently manifest from the statement itself.

### SUBSTITUTION OF ATTORNEYS

Since this cause was certified to this Court Hon. Henry M. Hoyt, one of the attorneys for Plaintiff in Error died, and recently Hon. Frank H. Norcross the other associate attorney has been appointed United States District Judge for Nevada and for that reason retiring from the case and substituting the undersigned attorneys.

It is respectfully submitted that the petition for rehearing should be granted.

CHARLES J. KAPPLER
SARDIS SUMMERFIELD
TALMAGE L. SMITH
Attorneys for Plaintiff in Error.

## CERTIFICATE OF COUNSEL

We the undersigned Attorneys and Counsel for Plaintiff in Error do hereby certify that the within and foregoing Petition for Rehearing is presented in good faith and not for delay.

CHARLES J. KAPPLER

SARDIS SUMMERFIELD

TALMAGE L. SMITH
Attorneys for Plaintiff in Error.